household goods during the summer 2002 cycle by more than $1 million over what DOD would have paid in the absence of the conspiracy. Pet. App. 6a.[1]

Petitioners' conditional plea agreement permitted them "to make only one argument in support of their motion to dismiss: that the conduct set forth in the statement of facts 'is immune from prosecution under the [Shipping Act.]' " Pet. App. 7a. Petitioners presented that argument to the district court, which dismissed the antitrust count based on its construction of Section 7(a)(4) of the Shipping Act, 46 U.S.C. App. 1706(a)(4). Section 7(a)(4) provides antitrust immunity for "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." 46 U.S.C. App. 1706(a)(4).

The district court focused its analysis on the foreign aspects of petitioners' business activities, rather than on the through rate agreement itself. The court found that petitioners provided some "local agent service," Pet. App. 41a, a factual premise that was not true for Pasha, see *id.* at 57a-58a, 60a. The court then held that "a basic reading of the statute concludes [*sic*] that Defendants' *business* 'concerns' the foreign inland segment." *Id.* at 44a (emphasis added); see *id.* at 44a-45a ("Defendants' behavior did concern a foreign inland segment of through transportation."). The court reasoned that

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[1] Petitioners incorrectly contend that the government engaged in "manifest forum shopping" (Pet. 2) by charging them in the Eastern District of Virginia. The investigation in this case began before petitioner Gosselin's managing director came to Hawaii for a trade conference, and it was commenced in the Eastern District of Virginia because the victim of the charged conspiracy—DOD—is located in that district.

"[d]efendants' conduct" did not have to relate "exclusively" or "significantly" to the foreign inland segment because Congress had not defined the term "concern" in the Shipping Act or indicated whether it should be given a broad or narrow scope. *Id.* at 45a. That "ambiguity," the court stated, required a construction in favor of petitioners. *Ibid.* The court held, however, that the Shipping Act provided no immunity under the federal fraud statute, and it refused to dismiss count two of the information. *Id.* at 50a-52a.[2]

3. The court of appeals reversed the district court's dismissal of the antitrust count. It held that a through rate agreement does not come within the plain meaning of Section 7(a)(4) because it is an agreement to fix "door-to-door rates, not just rates for the 'foreign inland segment' of the routes." Pet. App. 11a-12a. The court rejected petitioners' reliance on *United States* v. *Tucor International, Inc.*, 35 F. Supp. 2d 1172 (N.D. Cal. 1998), aff'd, 189 F.3d 834 (9th Cir. 1999).[3] It observed that, unlike the conduct at issue in *Tucor*, petitioners' activities did not occur entirely outside the United States. Rather, petitioners "took additional steps to perfect their bid-rigging plan," Pet. App. 12a, by having U.S. freight forwarders submit rigged bids to DOD. *Id.* at 12a-13a. Petitioners' agreement with FF-1 and the

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[2] The district court also held that petitioners' conduct was immunized by two other sections of the Shipping Act—Section 7(a)(2) and (c)(1), 46 U.S.C. App. 1706(a)(2) and (c)(1). See Pet. App. 46a-50a. The court of appeals rejected the district court's interpretation of those statutory provisions, *id.* at 14a-20a, and petitioners do not seek review of that portion of the court of appeals' decision in this Court.

[3] See *United States* v. *Tucor Int'l, Inc.*, 238 F.3d 1171 (9th Cir. 2001) (rejecting *Tucor* defendants' Hyde Amendment claims for attorneys fees).

other U.S. freight forwarders related to through rates and "had little to do with the German inland segment of the through services that these forwarders offered." *Id.* at 13a. Furthermore, when some of the freight forwarders "broke ranks," petitioners' measures to "rei[n] them in" were intended "to secure withdrawal of the competitive through rate bids the forwarders had filed in the second round, not to have consequences for the foreign inland segment." *Ibid.*

The court also reasoned that "a broad immunity of the sort that [petitioners] seek would threaten to excise antitrust liability from the through transportation market completely," because "any firm operating in any segment of any through transportation channel need only execute an agreement with a local moving agent to shield itself from the antitrust laws entirely." Pet. App. 13a. Because the activity for which petitioners sought immunity was not regulated by the Federal Maritime Commission (FMC)—the agency charged with enforcing the Shipping Act—the "upshot of [petitioners'] interpretation of § 1706(a)(4) would therefore be a through transportation market beset with collusive and artificially inflated bids, detrimental to consumers and noncooperating competitors alike." *Id.* at 14a. The court thought it "unlikely that Congress intended such dismaying effects, but if there is any doubt over whether § 1706(a)(4) affords defendants relief, it is settled by the maxim that exceptions to the antitrust laws should be construed narrowly." *Ibid.* (citing *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 732-733 (1973)).[1]

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[1] The court of appeals did "not address the government's alternative contention that the agreements for which [petitioners] seek immunity are beyond the coverage provisions of the Shipping Act and likewise beyond the FMC's jurisdiction. *See* [46 U.S.C. App.] 1703; *see also*

Because the court of appeals found no antitrust immunity under the Shipping Act for the conduct charged, the court did not reach the question whether such immunity would have extended, as petitioners urged, to immunize their conduct under the federal fraud statute as well. Pet. App. 21a.[5]

ARGUMENT

Petitioners contend (Pet. 11-29) that the court of appeals erred in holding that petitioners' bid-rigging scheme is not entitled to antitrust immunity under the Shipping Act. That decision does not conflict with any decision of this Court or of another court of appeals, including the Ninth Circuit's decision in *United States* v. *Tucor International, Inc.*, 189 F.3d 834 (1999), and it does not present any issue warranting this Court's review.

1. Contrary to petitioners' contention (Pet. 12), the court of appeals' decision does not create "a square conflict" with the Ninth Circuit's decision in *Tucor*. Section 7(a)(4) provides antitrust immunity for agreements "concerning *the foreign inland segment* of through transportation." 46 U.S.C. App. 1706(a)(4) (emphasis added). The conduct charged in *Tucor* and found immune from prosecution was an agreement among local Philippine agents to fix the *inland rate* they charged to U.S. freight forwarders for the Philippine *segment* of through transportation. 35 F. Supp. 2d at 1185. Para-

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Tucor, 189 F.3d at 837 (discussing a similar argument made in that case)." Pet. App. 20a n.3.

[5] The court rejected petitioners' challenges to the factual basis for their fraud conviction, concluding that the facts to which petitioners had stipulated established a factual predicate for fraud. Pet. App. 21a-23a. That holding is not challenged here.

graph 4(a) of the *Tucor* indictment charged a conspiracy among Philippine truckers to fix the prices "to be *paid by* U.S. freight forwarders for moving services" to the local agents. C.A. App. 83 (emphasis added).[6]

The decisions in *Tucor* emphasized that the indictment alleged an agreement involving activities that occurred "exclusively" and "entirely" within the Philippines—foreign inland transportation. 35 F. Supp. 2d at 1183, 1185; 189 F.3d at 835-836; 238 F.3d at 1176. Moreover, the U.S. freight forwarders in *Tucor* were *victims* of a local agents' scheme to raise rates for the local segment of a through rate, not co-conspirators in an agreement to raise through rates.[7]

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[6] Petitioners claim that "[i]n *Tucor*, the United States alleged that foreign carriers operating in the Philippines conspired with others to suppress competition *by fixing prices for the transportation of military household goods between the Philippines and the United States.*" Pet. 6 (emphasis added). In fact, Paragraph 2 of the *Tucor* indictment charged a conspiracy "to suppress competition by fixing prices for moving services *supplied in connection with* the transportation of military shipments of household goods between the Philippines and the United States." 35 F. Supp. 2d at 1175 (emphasis added) (correctly quoting the indictment). Paragraph 3 additionally specifies that both U.S. freight forwarders and DOD were victims of the conspiracy "among the defendants and co-conspirators" charged in the *Tucor* case to increase prices. C.A. App. 82. In this case, U.S. freight forwarders were participants in the conspiracy to fix through rates, and not, as in *Tucor*, the victims of a local agency conspiracy.

[7] Subparagraph 4(c) of the *Tucor* indictment charged that the defendants and co-conspirators caused the U.S. freight forwarders to cancel the low rates filed with DOD because they could no longer honor them when their costs for the foreign inland segment increased, C.A. App. 83, but that cancellation of rates was simply a practical consequence of the agreement. There is no allegation in the indictment that the U.S. freight forwarders had joined the conspiracy, which was intended to "increase to U.S. freight forwarders and the United States

The Ninth Circuit expressly recognized the importance of that distinction:

> "[T]hrough transportation" * * * includes all of the interrelated segments from the point of origin in the Philippines to the service person's new home in the U.S., though provided by different carriers along the way. The defendants are motor carriers operating entirely within the Philippines. For their part of the "through transportation," they packed, picked up, and trucked household shipments from Subic Naval Base and Clark Air Force Base, both in the Philippines, to a Philippine seaport. That is where the defendants' involvement ended.

189 F.3d at 836.

By contrast, the charged conduct in this case was an agreement between petitioners and U.S. freight forwarders to fix through rates charged *by* U.S. freight forwarders to DOD. The price fixing was not limited to a foreign segment of the transportation. Rather, the U.S. freight forwarders carried out their role in the conspiracy by submitting rigged bids to DOD for transportation services that included segments of transportation in the United States, rather than a segment entirely within some foreign country, as in *Tucor*.

Petitioners claim that the German agents in this case, like the truckers in *Tucor*, "reached an agreement among themselves to raise the prices that they receive." Pet. 13. The stipulated facts in this case, however, show that Gosselin agreed "to pay the German agents a specified rate in the 12 channels provided that the shipments moved in those channels at the second-low level." Pet. App. 63a. The German agents, in turn, threatened to

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Department of Defense the prices paid for moving services." See C.A. App. 82 (*Tucor* Indictment para. 3).

boycott "freight forwarders in the 12 channels unless the freight forwarders submitted me-too bids at the second level or above." *Ibid.* Nothing in the factual stipulation indicates that the German agents did anything more than accept Gosselin's offer to pay them more in exchange for their support of its attempt to raise through rates by conspiring with Pasha and the U.S. freight forwarders to submit rigged bids to DOD during the second round of bidding.[8]

The court of appeals correctly recognized that petitioners initiated the through rate agreement and then used the local German agents to ensure its efficacy through the boycott letter that Gosselin's managing director helped to draft. Pet. App. 62a-64a; see *id.* at 5a-6a (the conspiracy was initiated when "Gosselin was evidently alarmed that FF1 had been able to low-bid for the twelve channels without using Gosselin's landed rate"); see also *id.* at 31a-32a. Gosselin's managing director conferred with Pasha and UCC about raising the me-too rates before he helped prepare the boycott letter, and he promised to pay the agents a specified fee in return for their agreement to go along with the boycott. *Id.* at 5a-6a, 31a-32a. Petitioners then persuaded FF-1 to agree to withdraw its prime through rate and "secured [agreement] from other U.S. freight forwarders to file bids at or above the second low level," all of which "had little to do with the German inland segment of the through services these forwarders offered." *Id.* at 13a.

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[8] Indeed, the district court criticized petitioners for arguing beyond the stipulated facts, stating that "the additional facts that [petitioners] supply, concerning an initial price-fixing agreement among German agents" are "outside the factual record and this Court cannot consider them." Pet. App. 39a-40a.

The court of appeals correctly recognized that *Tucor* involved a distinctly different factual situation, that the holding of *Tucor* was limited to those specific facts, and that *Tucor* did not prevent the court from applying the plain language of the Shipping Act to the facts of this case. Pet. App. 12a-13a.

2. The court of appeals' decision is consistent with the plain language of Section 7(a)(4), which does not provide a blanket antitrust exemption for through rate agreements. Section 7(a)(4) exempts only those "agreement[s] or activit[ies] concerning *the foreign inland segment* of through transportation." 46 U.S.C. App. 1706(a)(4) (emphasis added). Petitioners argue that, because Congress did not expressly limit immunity to agreements that "solely" or "only" concern the "foreign inland segment of through transportation," the exemption must apply more broadly to agreements concerning through rates that merely include a foreign inland segment. But Congress did not have to say "solely" to make its intentions clear. Section 7(a)(4) states the coverage of the immunity Congress intended to provide.

Congress was familiar with through rates, which it defined in Section 3(24) as transportation "between a United States point or port and a foreign point or port." 46 U.S.C. App. 1702(24). And it knew how to exempt an agreement on through rates, as it showed by its grant of immunity in Section 4(a)(1) for vessel-operating common carriers. See 46 U.S.C. App. 1703(a)(1), 1704(a), 1706(a)(1). If Congress had wanted to exempt any and all agreements on through rates that included charges for transportation within a foreign county, it could have easily said so directly. Instead, Congress carefully limited the exemption to agreements concerning "the for-

eign inland segment of through transportation." 46 U.S.C. App. 1706(a)(4).[9]

Petitioners' resort to legislative history is also unpersuasive. Petitioners claim that Congress eliminated the word "solely" from Section 7(a)(4) in the drafting process and thereby indicated its intent to provide immunity beyond the "foreign inland segment." Pet. 17, 24-26. The provision of the 1981 bill that they cite, however, relates to the immunity ultimately enacted as Section 7(a)(3).[10] Petitioners have never claimed immunity under that Section, which immunizes only "any agreement or activity that relates to transportation services within or between foreign countries, whether or not via the United States, *unless that agreement or activity has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States.*" 46 U.S.C. App. 1706(a)(3) (emphasis added). See H.R. Rep. No.

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[9] See *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (citing the "familiar principle of *expressio unius est exclusio alterius*," which cautions that, when Congress enacts a provision explicitly defining the reach of a statute, it implies that matters not specifically defined are not within the statute's reach); accord *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("Congress implicitly excluded a general discovery rule by explicitly including a more limited one.").

[10] Congress spent years considering legislation that it ultimately enacted as the Shipping Act of 1984. The 1981 provision that petitioners cite gave antitrust immunity to "any agreement or activity that relates solely to transportation services *between foreign countries.*" S. 1593, 97th Cong., 1st Sess. § 8(a)(4) (1981) (emphasis added). That provision remained in the committee bill reported out in 1982, although it was expanded to cover agreements on transportation "within" as well as "between" foreign countries. S. 1593, 97th Cong., 2d Sess. § 8(a)(4) (1982).

53, 98th Cong., 1st Sess. Pt. 2, at 32-33 (1983); H.R. Conf. Rep. No. 600, 98th Cong., 2d Sess. 37 (1984).[11]

Section 7(a)(4) has separate origins. It first appeared as Section 8(a)(7) of the 1982 committee bill, and it provided an exemption for "any agreement or activity concerning the inland portion of any intermodal movement occurring outside the United States, though part of transportation provided in a United States import or export trade." S. 1593, 97th Cong., 2d Sess. (1982). It did not change substantively from its initial drafting, and it does not reflect in its language or its legislative history any congressional intent to extend immunity from agreements and activities "concerning the foreign inland segment of through transportation" to any agreement or activity concerning a through rate that includes a foreign inland segment.[12]

The court of appeals also correctly observed that petitioners' interpretation of Section 7(a)(4) would "threaten

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[11] The district court in *Tucor* also confused the history of Section 7(a)(3) with that of Section 7(a)(4). See Pet. 24, citing *Tucor*, 35 F. Supp. 2d at 1181-1182; Pet. 19 (discussing comity).

[12] As already noted (see note 4, *supra*), the court of appeals did not address the government's additional argument that there is no immunity in this case because Section 4 of the Shipping Act, 46 U.S.C. App. 1703, which sets forth the agreements that are covered by the Act, including the agreements to which Section 7 immunity extends, covers only agreements "by or among ocean common carriers" or "among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers." 46 U.S.C. App. 1703(a) and (b). Because no ocean common carrier was a party to the agreement in this case, the agreement was not covered by the Shipping Act, was not regulated by the FMC, and could receive no immunity under Section 7. See 46 U.S.C. App. 1703-1706; H.R. Conf. Rep. No. 600, *supra*, at 28 ("section [4] states the coverage of the bill," and "[w]hen read in connection with sections 5 and 7, the effect is to remove the listed agreements from the reach of the antitrust laws").

to excise antitrust liability from the through transportation market completely." Pet. App. 13a. Petitioners are incorrect in claiming (Pet. 26) that FMC or foreign regulation fills that gap. To the extent that agreements affecting U.S. commerce are subject to FMC regulation, Congress did grant immunity. See 46 U.S.C. App. 1706(a)(1) and (2). But agreements or arrangements among U.S. freight forwarders setting the rates charged to DOD for the movement of property are not subject to FMC regulation, and foreign regulation is plainly not adequate to protect against an agreement aimed at raising prices charged to a United States agency responsible for the national defense.[13]

Petitioners also claim that "the Court of Appeals began its analysis" of the Shipping Act "on the wrong foot by starting with the interpretive premise that 'exemptions from antitrust laws' should be 'narrowly' construed." Pet. 17. They argue that reliance on that premise is inappropriate in this case because an "ambiguous" statute should not be interpreted to interfere with the sovereign authority of another country and because a court should exercise restraint in interpreting a criminal statute. Pet. App. 17a-18a (quoting *F. Hoffman-*

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[13] Petitioners incorrectly assert that "antitrust exemptions already apply to every other segment of the transportation of household military goods." Pet. 25. In fact, no law immunizes agreements among U.S. freight forwarders to fix their through rates, and no law exempts foreign port agents' services, U.S. port agency services, liftvan charges, or foreign general agent services from the antitrust laws. The ICC Termination Act provides limited antitrust immunity for motor carriers to agree on joint rates with different carriers providing different segments of an overall move, but that immunity is coupled with concomitant regulation by the Surface Transportation Board to ensure that the agreements are not unduly restrictive of competition. 49 U.S.C. 13703(a)(2), (3) and (5).

LaRoche Ltd. v. *Empagram S.A.*, 542 U.S. 155, 164 (2004). Those arguments ignore the plain language of the Shipping Act, the facts of this case, and prior decisions of this Court.

There is nothing ambiguous about Section 7(a)(4) of the Shipping Act as applied to the facts of this case. Petitioners entered into an agreement to fix through rates paid by DOD for transportation that occurs in part within the United States; they did not enter into an agreement concerning only transportation within a foreign country or countries. Pet. App. 11a-14a. Petitioners do not claim that their agreement to fix through rates was subject to FMC regulation. Rather, they assert that the Shipping Act gave them antitrust immunity without any of the Act's "regulatory strings attached." *Id.* at 9a. Particularly in light of that sweeping claim, the court of appeals was correct in observing that its interpretation of the plain language of the Shipping Act was supported by this Court's decisions holding that exemptions from the antitrust laws should be strictly construed.[11]

The United States has a strong sovereign interest in protecting the competitive process that DOD uses to select companies that provide services supporting national defense activities, a process that does not inter-

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[11] See, *e.g.*, *Seatrain Lines*, 411 U.S. at 733 (construing the 1916 Shipping Act); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 216 (1966) ("the implementation of rate-making agreements which have not been approved by the Federal Maritime Commission is subject to the antitrust laws"); see also *United States* v. *Borden Co.*, 308 U.S. 188, 206 (1939) (no antitrust immunity under the Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, or the Capper-Volstead Act, 7 U.S.C. 451 *et seq.*, for conduct unregulated by Secretary of Agriculture).

fere with the sovereign authority of Germany. The United States is prosecuting "*domestic* conduct" (Pet. 17) that was carried out in the United States. Petitioners' conspiracy resulted in U.S. companies submitting rigged bids to DOD. That conspiracy affected the shipment of household goods within the United States as the final leg of the door-to-door move from Germany. And that conspiracy affected a quintessentially domestic interest—more than $1 million in overcharges to DOD borne by U.S. taxpayers.

Contrary to petitioners' suggestion (Pet. 17-20), this case bears no similarity to *Empagran*, *supra*. The Court ruled in *Empagran* that foreign plaintiffs could not sue under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, for injuries sustained "solely" in foreign countries. 542 U.S. at 159. The Court emphasized, however, that "a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury [although] a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm." *Ibid.*; see *id.* at 165 (application of antitrust laws to foreign anticompetitive conduct that causes injury in the United States is fully consistent with principles of comity). The United States' criminal prosecution in this case, which seeks to protect the American public from anticompetitive conduct, does not interfere with the ability of Germany to investigate and prosecute any conduct by petitioners or their coconspirators that, in Germany's estimation, violates German laws. See *id.* at 170-171.[15]

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[15] Likewise, Germany's investigation and possible prosecution of local German agents does not override the interests of the United States in this case. See Pet. 26. "The German government's demonstrated ability to regulate conduct *within its own borders*," Pet. 27 (emphasis added),

The court of appeals did not "neglect[] the principle that criminal statutes should be narrowly construed." Pet. 20 (citing *Arthur Andersen LLP* v. *United States*, 125 S. Ct. 2129 (2005)). That principle does not trump all other principles of statutory construction. Indeed, in this case, the statute at issue—the Shipping Act— is a civil statute, and, moreover, the rule that antitrust exemptions must be construed narrowly has been applied in both civil and criminal cases. See note 14, *supra* (citing cases). Petitioners do not deny that they violated the Sherman Act if the Shipping Act does not immunize their conduct. This case bears no similarity to *Arthur Andersen*, where the defendant was convicted of obstruction of justice, 18 U.S.C. 1512(b)(2)(A) and (B), and this Court examined the obstruction statute to determine the *mens rea* element of the offense defined in that criminal statute.[16]

Petitioners' suggestions that their reliance on *Tucor* should exempt them from prosecution, Pet. 20, and that they were not given "fair warning" that their conduct was illegal, Pet. 21, cannot be reconciled with the stipulated facts. Nothing in the stipulation or the information—which constitute the complete factual record in

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does not preclude the United States from regulating conduct within its own borders aimed at DOD and harming American taxpayers.

[16] In *Arthur Andersen*, this Court reversed a conviction because the jury was permitted to find the defendant guilty of "knowingly" or "corruptly" persuading another person "with intent" to induce that person to withhold testimony or documents from a judicial proceeding without finding a criminal intent or "consciousness of wrongdoing." 125 S. Ct. at 2134; see *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 434-446 (1978) (*mens rea* is an element of a criminal Sherman Act prosecution). The Court's decision in *Arthur Andersen* does not suggest that the normal rules of statutory construction have no place in criminal prosecutions or in interpreting statutory language.

this case, Pet. App. 57a—suggests that the petitioners knew about or relied on *Tucor* in entering into their agreement to fix through rates. See Pet. 20 (claiming such reliance without record citation). Moreover, any reliance would not have been justified because, as explained above, *Tucor* involved markedly different criminal conduct.

3. There is no merit to petitioners' final suggestion (Pet. 28-29) that, if the Court decides to review the court of appeals' determination that petitioners are not entitled to immunity on the antitrust count of the information, it should also examine whether petitioners are entitled to immunity on the fraud count as well. The court of appeals correctly ruled, and petitioners do not challenge, "that the factual recitations in the plea documents easily" state facts that "constitute an offense under § 371." Pet. App. 22a. If petitioners had wanted to test the government's theory of fraud in this case, they should have refused to enter into a conditional plea bargain agreement limiting the arguments they could make in this case (see p. 7, *supra*), pleaded not guilty, and put the government to its burden of proof at trial. Instead, they admitted facts that established a Section 371 violation and pleaded guilty to that offense. Petitioners should not be relieved of the consequences of their guilty pleas even if this Court decides to review the decision of the court of appeals with respect to the Sherman Act. Cf. *United States* v. *Broce*, 488 U.S. 563, 571 (1989) (voluntary and intelligent plea cannot be challenged based on a relinquished defense, even if defendants

"may believe that they made a strategic miscalculation").[17]

In any event, the Shipping Act's exemptions are expressly limited to the "antitrust laws," which in turn are limited to the antitrust statutes in Title 15. See 46 U.S.C. App. 1702(2), 1706(c)(2). The Shipping Act makes no mention of the federal fraud statute. Accordingly, the express language of the Shipping Act fully supports the district court's conclusion that the statute does not preclude a prosecution for a violation of 18 U.S.C. 371.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2006

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[17] Petitioners incorrectly claim (Pet. 28) that "there is no allegation of any separate fraudulent or misleading statements made by the petitioners" apart from the conduct charged in Count One. To the contrary, petitioners stipulated to the fact that, in addition to the price fixing, they conspired to provide misleading information to DOD to ensure that no shipments were tendered to U.S. freight forwarders that had filed me-too rates below the second-low level. Pet. App. 65a.

No. 05-677

IN THE

Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V. AND THE PASHA GROUP,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether the Fourth Circuit erred in concluding, contrary to the Ninth Circuit and to well-established rules of statutory construction, that an antitrust exemption provided by the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq.*, does not apply to activities or agreements relating to the transportation of U.S. military household goods in foreign countries, solely because those activities or agreements also impact the transportation of goods within the United States.

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INTRODUCTION

The Government does not dispute that the Court of Appeals expressed not a whit of concern for the decision's impact upon the antitrust policies of foreign sovereigns, notwithstanding the express direction of *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) and the actual interference demonstrated here by the amicus brief filed by the Government of Belgium. Nor can the Government ignore the fact that Congress sought to avoid precisely such a conflict of laws by exempting from the antitrust laws "any agreement or activity concerning the foreign inland segment of through transportation." 46 U.S.C. App. § 1706(a)(4).

The Government devotes its brief, instead, to shading the stipulated facts so as to obscure the Fourth Circuit's break with the Ninth Circuit, arguing that the facts here differ from those which the same Department of Justice officials prosecuted and lost in *United States v. Tucor Int'l, Inc.*, 189 F.3d 834 (9th Cir. 1999). No matter how dark the shade of lipstick, however, the Government cannot hide that the case remains the same pig.

The Government portrays *Tucor* as a conspiracy involving solely foreign agents, while this case purportedly involves just "petitioners and U.S. freight forwarders." Yet in *Tucor*, the named defendant was an American company, the charged conduct also occurred in the United States, and the Government in fact claimed that the conspiracy "target[ed] only the United States." Reply Br. for U.S. at 1, 189 F.3d 834 (9th Cir. 1999) (No. 98-10316) (available at 1999 WL 33612244, at *1). In fact, *Tucor*, like this case, involved both foreign and domestic conduct.

As even the Fourth Circuit recognized, the "[t]he first step in this scheme" at issue here was not domestic, but rather "was the agreement with twelve large German local agents to handle no business from forwarders who filed bids

below the second low level," and it was "the success" of that agreement upon which the entire conspiracy depended. App. 11a. The Statement of Facts ("SOF") confirms that just as in *Tucor*, the charged conspiracy concerned an agreement among "12 of the largest German agents, including Gosselin GMBH" to do business only with freight forwarders who filed a certain through rate—an agreement reached before any freight forwarder ever learned about the charged conduct. App. 63a.

The Department of Justice's efforts to obscure this clear split stand sharply at odds with its affirmative maneuvers to avoid the Ninth Circuit. The Government does not dispute that (1) one petitioner is a domiciliary of California, (2) the other's managing director was arrested in Hawaii; and (3) the director's release from custody was *expressly* conditioned on consent to venue in the Eastern District of Virginia. The Government claims that venue was nonetheless proper because the Department of Defense resides in Virginia, but the availability of that venue was hardly what prompted the deliberate efforts to avoid the Ninth Circuit.

Indeed, the Government's ability to move this prosecution to the Eastern District of Virginia demonstrates only that having forum shopped its way to a friendly decision, the Government may bring all future prosecutions there, negating the Ninth Circuit's decision in *Tucor* and avoiding any deepening of the circuit split at issue in this case. Because this case presents the best vehicle for the resolution of the question presented, and because of the foreign relations and fair-notice concerns at issue in this *criminal* prosecution, certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A STARK CIRCUIT CONFLICT.

The Government claims that the decision below creates no conflict with the Ninth Circuit and thus does not warrant

review, because *Tucor* involved the "distinctly different factual situation" of a price-fixing agreement among Philippine agents that was "limited to a foreign segment of the [through] transportation." U.S. Br. 11-14. This case involves the same "factual situation" as *Tucor*: an agreement among foreign agents to fix prices on the foreign inland segment.

1. Despite the Government's shading, the *only* real difference between the two cases lies in when the freight forwarders learned of the foreign agents' agreement. In *Tucor*, the freight forwarders only learned of the agreement after the bidding process was over, and as a result, the low-bid freight forwarders became "victims" because they were forced to cancel their rates with DOD. Cert Petn. 14 n.5. By contrast, here, the foreign agents notified the freight forwarders before bidding ended, allowing all but one of the freight forwarders to submit higher bids in response to the foreign agents' demands. App. 63a-64a.

The Government repeats its "freight forwarder as victim" theory, but nowhere does it explain why this should make any legal difference as to whether an otherwise identical conspiracy is exempt from U.S. antitrust laws.[1] The indictments in *Tucor* and this case both involved an agreement to increase the prices the U.S. government paid for the transportation of military household goods. *Compare* C.A. App. 82 (*Tucor* Indictment ¶ 3) ("The charged combination and conspiracy consisted of a continuing agreement ... among the defendants co-conspirators, *the substantial term of which was to increase to U.S. freight*

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[1] Indeed, even in *Tucor*, the Government recognized that not all freight forwarders were "victims" of the conspiracy, because the two freight forwarders with *high* rates on file *benefited* from the foreign agents' agreement. C.A. App. 83 (¶¶ 4(c)-(d)). Thus, in *Tucor* as well as this case, the freight forwarders served as the means by which the foreign agents obtained higher rates.

forwarders and the United States Department of Defense the prices paid for moving services.") (emphasis added), *with* C.A. App. 24 (*Gosselin* Information ¶ 2) ("The charged combination and conspiracy consisted of a continuing agreement ... among defendants and co-conspirators, *the substantial term of which was to increase the rates paid by DOD for the transportation of military household goods from Germany to the United States.*") (emphasis added).

Contrary to the Government's new-found reading of *Tucor*, that case decidedly was *not* limited to an agreement concerning only the foreign inland segment. The Government not only charged the *Tucor* defendants with seeking to "increase to ... the United States Department of Defense the prices paid for moving services," C.A. App. 82, but it specifically argued that the charged conduct "target[ed] only the United States," Reply Br. for U.S. at 1, 189 F.3d 834. The defendants also included an *American* company, C.A. App. 85 (*Tucor* Indictment ¶9). Indeed, while the Government asserts before this Court that the activity occurred "exclusively" within the Philippines, the Government alleged in *Tucor* that the conspiracy "was formed and carried out, in part, within the Northern District of California." *Id.* at 89 (*Tucor* Indictment ¶ 20). The *Tucor* conspiracy thus involved precisely the same conduct at issue here—an agreement among foreign agents that, even if centered abroad, clearly impacted the through rates paid by DOD. U.S. Br. 12.

Accordingly, the Ninth Circuit's opinion was not limited to price-fixing agreements concerning *only* the foreign inland segment: rather, the Ninth Circuit specifically held that § 1706(a)(4)'s exemption "clearly applies to any agreement—*without limitation*—concerning the foreign inland segment of through transportation." 189 F.3d at 837 (emphasis added). The Government cannot distinguish away this circuit conflict either by relying on the Ninth Circuit's decision or by contradicting its earlier representations in *Tucor*.

2. Just as the Government closes its eyes to the domestic conduct in *Tucor*, it also downplays the foreign conduct here to the point of barely involving the foreign agents at all. *See* U.S. Br. 12 ("[T]he charged conduct in this case was an agreement between petitioners and U.S. freight forwarders to fix through rates charged *by* U.S. freight forwarders to DOD."). According to the Government, "[n]othing in the factual stipulation indicates that the German agents did anything more than accept Gosselin's offer to pay them more in exchange for their support of its attempt to raise through rates ....." *Id.* at 13. That is outright false: the SOF makes clear that the German agents reached agreement before a single freight forwarder even became aware of its existence.[2]

The Government admits that the agreement in this case originated in a conversation between Gosselin's managing director and a "landed rate competitor" that expressed concern over the low bids filed by one of the freight forwarders. U.S. Br. 4-5. What the Government omits from its description, however, is that both the competitor and Gosselin (which wears two hats) were local "German agents," and nothing in the SOF suggests that they were acting as "landed rate competitors." App. 62a, 63a (SOF ¶¶ 20, 22). The email that began the conspiracy voiced the concern of *local German agents* that *rates for German inland services* would be reduced. App. 63a. It was this discussion that led to an agreement among the *local German agents* before any freight forwarder became involved. *Id.*

The Fourth Circuit's decision states with crystalline clarity that "[t]he German agents, for their part, agreed not to

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[2] Indeed, it is also false to say that Gosselin "offered to pay them more." This is nowhere supported by the SOF, nor is it true: Gosselin offered to pay the agents their minimum rate, and nothing "more." As the agents themselves knew, unless the business was handled at the second-low rate (the rate the agents demanded), the carriers could not have paid the agents their minimum rates.

handle business from freight forwarders in those channels unless the forwarders submitted me-too bids at the second lowest level (the 'second low') or above." App. 6a; *see also id.* at 63a (SOF ¶ 22). Nothing in the SOF suggests that the foreign agents reached this agreement among themselves in reliance on, or on condition of, anything that petitioners did at all, particularly as to the freight forwarders.

Thus, the conspiracy charged in this case, as in *Tucor*, turned on the foreign agents' agreement to fix the prices charged to DOD. App. at 6a; *see also id.* at 12a ("It is true that defendants' original agreement with the German local agents may have had the relationship to a 'foreign inland segment' that the statute requires."). The only question is whether the Fourth Circuit correctly held that because petitioners "took additional steps to perfect their bid-rigging plan," by communicating the agreement to the freight forwarders, the agreement no longer "concerned" the foreign inland segment. *Id.* at 12a-14a. But this is not a meaningful distinction from *Tucor*, where the defendants also engaged in activity outside the foreign inland segment, and indeed "the substantial term" of their agreement was to increase the through rate. What the Fourth Circuit described as "additional steps" constitute no basis for distinguishing the Ninth Circuit's decision. This case therefore presents an appropriate vehicle for certiorari.

II. THE DECISION BELOW MISCONSTRUES THE SHIPPING ACT.

The Government's defense of the Court of Appeals' statutory holding gets no further than its effort to mask the circuit split. Indeed, it enters the realm of tautology: the decision below "is consistent with the plain language of Section 7(a)(4)" because the statute "does not provide a blanket antitrust exemption for through rate agreements," and "petitioners entered into an agreement to fix through rates." U.S. Br. 14, 18. Never once does the Government identify the "through rate agreement" at issue, and it is a

straw man in this case, which concerns a conspiracy initiated and enforced by local German agents. App. 63a.

1. The Court of Appeals acknowledged the nuances over which the Government now stumbles, accepting that the "first step" in the charged conduct "was the agreement with twelve large German local agents to handle no business from forwarders who filed bids below the second level," and that "the success" of the agreement "depended entirely on the viability of the arrangement defendants had reached with the local German firms." App. 11a. The Court of Appeals nonetheless reversed on the ground that petitioners' "additional step" in communicating the agreement so as to induce the withdrawal of through rates, meant this conduct no longer "concerned" the "foreign inland segment."

The Government repeats the Court of Appeals' conclusion: because petitioners "did not enter into an agreement concerning *only* transportation within a foreign country or countries," U.S. Br. 18 (emphasis added), they are not entitled to immunity. Congress, however, did not exempt agreements that "only" related to transportation within a foreign country, but exempted all agreements that "concerned" the "foreign inland segment."

The Government contends that "Congress did not have to say 'solely' to makes its intentions clear," *id.* at 14, but Congress' intentions are captured by the words of the statute itself. An agreement can "concern" both the foreign inland segment and the through rate as a whole, because concern, like its synonym "relates," is a "highly general" term, which this Court has "interpreted broadly." *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 38 (1996); *see also* Cert. Petn. at 22-23. There is thus no natural sense in which the statute may properly be interpreted to apply to agreements *solely* concerning the foreign inland segment, as the Court of Appeals held. Rather, the Court of Appeals reached its decision because it mistakenly believed itself under an obligation to construe the amendment narrowly.

2. Congress in fact expressly removed the word "solely" from the Shipping Act exemptions, precisely because the foreign shipping industry expressed concern that "the word 'solely' ... could be construed" to exclude "arrangements by conferences or ocean carriers for inland foreign ... transportation in connection with intermodal routes or services." *1981 Shipping Act: Hearing Before Subcomm. On Merchant Marine of the Senate Comm. On Commerce, Science and Transp.*, 97th Cong. 208 (1981).

The Government emphasizes that the word "solely" appeared in the original draft of Section 7(a)(3) of the Shipping Act and claims that both petitioners and "the district court in *Tucor* ... confused" its history "with that of Section 7(a)(4)." U.S. Br. 15 & 16 n.11. There is no such confusion. Following the 1981 hearings, Congress deleted "solely" from Section 7(a)(3) *and* added a separate Section 7(a)(4) to expressly exclude the "inland portion of any intermodal movement occurring outside the United States." S. 1593, 97th Cong., 2d Sess. (1982). The removal of "solely" and the addition of Section 7(a)(4) were not two independent events, but rather a concerted effort to ensure that the very conduct at issue here fell within the exemption.

3. The Government virtually ignores the canons of construction, except to argue that the Court of Appeals had no need for any canon because "[t]here is nothing ambiguous about Section 7(a)(4) of the Shipping Act as applied to the facts of this case." U.S. Br. 18. The Government's refusal to admit any ambiguity begs the question of what "facts" it has in mind, given the foreign agents' principal role in the charged conduct, and given the statute's broad exemption of all agreements "concerning" the foreign inland segment.

a. The Court of Appeals reached a contrary conclusion only because it believed itself bound to construe the antitrust laws narrowly in this criminal case. To the contrary, the canon of construction works precisely in reverse, requiring courts to "exercise[] restraint in assessing the reach of a